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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

JUN 22 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of
MARTHA J. HUBER, et al.

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

)
) MM Docket No. 93-51

)
) File Nos. BPH-911114ME,
) et al.

TO: Honorable Richard L. Sippel
Administrative Law Judge

OPPOSITION TO REQUEST FOR PERMISSION TO FILE APPEAL

Martha J. Huber (Huber), by her attorneys, and pursuant to the Presiding Judge's Order, FCC 93M-390 (issued June 21, 1993), now opposes the "Request for Permission to File Appeal" filed by Rita Reyna Brent (Brent) on June 21, 1993.

Brent seeks leave to appeal the Presiding Judge's Memorandum Opinion and Order. FCC 93M-374 (released June 17,

In order for Brent's request to be granted, she must show:

that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception.

Section 1.301(b) of the Commission's rules. Brent cannot meet either prong of that test. Brent's appeal does not raise any question of law or policy, never mind a new or novel question. Brent is not disputing the Presiding Judge's recitation of the law concerning financial qualifications, but the application of that law to her situation. There is nothing new or novel about the Commission's financial qualifications standards. Indeed, the Presiding Judge has already applied those standards to the other applicants in this proceeding and specified financial qualifications issues against them.

Brent also cannot meet the second prong of the test imposed by the Commission's rules. No remand will occur if an appeal is not allowed. Indeed, a remand is likely to occur if Brent's financial qualifications are not tested in a hearing. If Brent can actually demonstrate that she has been continuously financially qualified, she has suffered no cognizable harm from proving her qualifications in a hearing. If she is not financially qualified, however, it would disserve the public interest and would violate the Communications Act to allow Brent to avoid a hearing when the Presiding Judge has already determined that a hearing is necessary. The Commission has repeatedly expressed concerns

about financially qualified applicants who abuse the Commission's processes by wasting the resources of the Commission and financially qualified applicants. Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd 3853, 3858-3859, 66 RR 2d 519, 528-529 (1989), Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits, 2 FCC Rcd 2122, 62 RR 2d 638 (1987).

The Review Board has recognized that rulings on petitions to enlarge issues are not appropriate subjects for interlocutory appeals. In Modesto Broadcast Group, 5 FCC Rcd 1674 (Rev Bd 1990) ~~the Board wholly refused to consider an~~

evidence after the Presiding Judge has ruled is improper and disruptive. As the Court of Appeals noted in Colorado Radio Corp. v. FCC, 1187 F.2d 24, 26 (D.C. Cir. 1941), an applicant may not:

sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

Indeed, Brent has had several opportunities to clarify the situation by producing the underlying documents, but she has fought disclosure of these documents at every possible turn. The only way to resolve the substantial and material questions of fact which the Presiding Judge has found is to hold a hearing. The new Brent affidavit may not be considered.

Even if the new declaration is considered, it provides no basis for granting Brent's request. Brent's premise is that the sole basis for specifying an issue was that there is a question as to whether the balance sheet Brent allegedly had was a joint balance sheet. Brent's premise is incorrect. First of all, Paragraph 7 of the Presiding Judge's order raises concerns about Brent's budget which are not addressed in the request. Furthermore, as Huber has shown in her petition and reply, there is a substantial and material question as to whether Brent actually had financing documents in hand when she signed her application. The Presiding Judge's action was based upon the totality of circumstances presented by Huber and by Brent, and Brent's request

interprets the order in a narrow and strained manner. The request must therefore be denied.

Even if the Presiding Judge allows Brent to file an appeal, he should order Brent to promptly produce all of the documents Huber requested in her petition to enlarge issues. The Presiding Judge has made clear that he intends to try the issue at the August 10 hearing session, so discovery must be undertaken as soon as possible. If Brent is granted a stay of discovery pending an appeal, it will be impossible to try the issue during the August 10 hearing session. Brent has not even attempted to show that she meets the criteria for a stay, nor has she met the requirement of Section 1.44(e) of the Commission's rules that a stay request be filed as a separate pleading. Regardless of the ruling on the Brent pleading, therefore, the Presiding Judge must order Brent to promptly produce all of the documents Huber requested.

Finally, Brent argues that the Presiding Judge addresses a broader issue than Huber requested, and she requests that the Presiding Judge limit the scope of the issue added. Brent Request, P. 2, including n.3. Brent's claim must be rejected. Her request is an improper petition for reconsideration of an interlocutory action which is banned by Section 1.106(a)(1) of the Commission's rules. The financial qualifications issue requested by Huber was not limited to an inquiry as to the availability of funds. In order to prove financial

in serious and reasonable efforts to ascertain predictable construction and operation costs." Northampton Media Associates, 4 FCC Rcd 5517, 5519, 66 RR 2d 1246, 1249 (1989). The bases for adding financial qualifications issues against the other applicants in this proceeding were quite narrow. For instance, the petitions filed against Huber and Staton by Brent raised no questions about their cost estimates. Nonetheless, the Presiding Judge added general financial qualifications issues against all applicants. Brent has not justified disparate treatment.

Accordingly, Huber asks the Presiding Judge to deny Brent's "Request for Permission to File and Appeal."

Respectfully submitted,

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Date: June 22, 1993

CERTIFICATE OF SERVICE

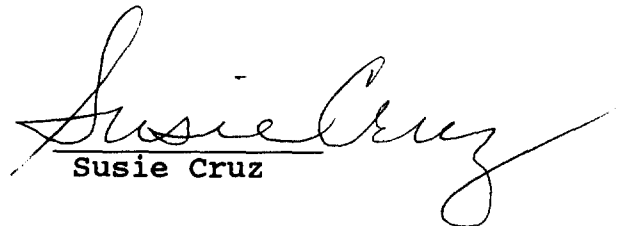
I, Susie Cruz, do hereby certify that on the 22th day of June 1993, a copy of the foregoing "Opposition to Request for Permission to File Appeal" was sent first-class mail, postage prepaid to the following:

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